Supreme Court, U.S.
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Case No. 85-1529

In The Supreme Court of the United States

OCTOBER TERM, 1985

GRUMMAN AEROSPACE CORPORATION,
Petitioner,

v.

EDWIN LEES SHAW,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

Reply Brief of Petitioner

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RULE 28.1 LISTING

A complete listing in conformance with Supreme Court Rule 28.1 was included in the Petition for *Certiorari*.

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ARGUMENT

The Respondent's Brief in Opposition reinforces the grounds set forth in the Petition for Writ of *Certiorari* for granting the Writ, namely that this Court should grant *certiorari* in this case because of an unresolved conflict among the Circuits with respect to the controlling issue of the military contractor defense. Furthermore, this Court should grant *certiorari* to resolve the nationally important issue of whether the judiciary should second-guess the judgment of the United States Military in approving the design of a military weapons system it has selected for use.

I. RESPONDENT CONCEDES A CONFLICT AMONG THE CIRCUITS ON THE CONTROLLING ISSUE OF THE MILITARY CONTRACTOR DEFENSE.

On Page 7 of the Respondent's Brief in Opposition, Respondent admits that there is a conflict among the Circuits concerning the elements of the military contractor defense. For this reason alone, as set forth in Supreme Court Rule 17.1(a), *certiorari* should be granted to review the decision of the Eleventh Circuit Court of Appeals in this case which created the conflict.

II. THE CIRCUIT CONFLICT WAS NOT RESOLVED BY *SHEARER*.

Respondent contends that the conflict among the Circuits was resolved by this Court's decision in *U.S. v. Shearer*, U.S. , 105 S.Ct. 3039 (1985). However, *Shearer* did not even address the issue of the military contractor defense. It therefore resolved none of the conflict between the uniform holdings in the Ninth, Third, Fifth and Seventh Circuits, following the Ninth Circuit's decision in *McKay v. Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043, 104 S.Ct. 711 (1984), and the Eleventh Circuit's opinion in this case, which declined to follow *McKay*.

Respondent relies upon this Court's *dictum* in footnote 4 in *Shearer*. In that note, this Court stated that two factors underlying this Court's holding in *Feres v. U.S.*, 340 U.S. 135, 71 S.Ct. 153 (1950)—that the government's duty to supervise servicemen should not depend on the local law of

the various states, and that a serviceman's dependents are entitled to statutory veterans benefits—were "no longer controlling." 105 S.Ct. 3039 at 3043, n.4. Respondent seeks to elevate that statement to a pronouncement that one rationale for the *McKay* decision—that government contractor liability would subvert the *Feres-Stencel* rule since the cost of accidents would be passed to the government—is no longer valid. Even assuming that to be the intent of footnote 4 in *Shearer,* which Petitioner disputes, *Shearer's* focus on judicial second-guessing of military decision-making reinforces the other rationales for *McKay,* which Respondent ignores in his Brief, and with which the Eleventh Circuit in this case specifically disagreed.

McKay's rationale that "to hold military suppliers liable for defective designs where the United States set or approved the design specifications would thrust the judiciary into the making of military decisions," 704 F.2d 444 at 449, was reinforced by *Shearer.* Likewise, *McKay's* rationale that the military contractor defense allows government contractors "to push technology towards its limits" thereby incurring "risks beyond those that would be acceptable for ordinary consumer goods," 704 F.2d 444 at 450, remains as a compelling justification for the *McKay* military contractor defense. Finally, the fact that a military contractor defense "provides incentives for suppliers of military equipment to work closely with and to consult the military authorities in the development and testing of equipment," 704 F.2d 444 at 450, also is reinforced by the *Shearer* decision. The Eleventh Circuit in this case specifically disagreed with the latter two rationales for *McKay. Shaw v. Grumman Aerospace Corp.,* 778 F.2d 736 at 743 (11th Cir. 1985). Thus, a clear conflict remains between the *McKay* version of the military contractor defense followed by the Ninth, Third, Fifth and Seventh Circuits, and the *Shaw* version enunciated by the Eleventh Circuit in this case.

III. RESPONDENT ADMITS THAT THERE IS A CONFLICT IN THE CIRCUITS ON THE CONTROLLING ISSUE OF THE MILITARY CONTRACTOR DEFENSE EVEN AFTER *SHEARER.*

Perhaps the most comprehensive discussion of the military contractor defense is contained in the Fifth Circuit decision of *Bynum v. FMC Corp.*, 770 F.2d 556 (5th Cir. 1985). As Respondent recognizes, that case was decided after this Court's decision in *Shearer,* and followed the *McKay* version of the military contractor defense. Therefore, Respondent admits that a conflict among the Circuits continues even after *Shearer.* For that reason, this Court should grant *certiorari* to review the Eleventh Circuit's opinion in this case, which created the conflict.

IV. RESPONDENT FAILED TO REBUT PETITIONER'S SHOWING THAT *CERTIORARI* SHOULD BE GRANTED TO RESOLVE THE NATIONALLY IMPORTANT ISSUE OF WHETHER THE JUDICIARY SHOULD SECOND-GUESS THE JUDGMENT OF THE UNITED STATES MILITARY IN APPROVING THE DESIGN OF A MILITARY WEAPONS SYSTEM IT HAS SELECTED FOR USE.

In its Petition at pp. 7-10, Petitioner showed that *certiorari* should be granted in this case pursuant to Supreme Court Rule 17.1(c) in order for this Court to resolve the nationally important issue of whether the judiciary should be allowed to second-guess the judgment of the military in approving the design of a weapons system it has selected for use. Respondent failed even to respond to that portion of the Petition, and therefore has failed to rebut Petitioner's showing. *Certiorari* should be granted in this case in order to resolve that issue, as well as to resolve the conflict among the Circuits on the military contractor defense.

VI. CONCLUSION.

For all of the foregoing reasons, as well as for the reasons set forth in the Petition for Writ of *Certiorari* previously filed by Petitioner, Petitioner respectfully requests that this Court

grant *certiorari* to review the decision of the Eleventh Circuit Court of Appeals in this case.

Respectfully submitted,

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